SUPREME COURT, U. S.

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-1507

CHARLES MASCUILLI,

Petitioner,

v.

AMERICAN EXPORT ISBRANDTSEN LINES, INC.

v.

ATLANTIC & GULF STEVEDORES, INC.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Charles Mascuilli, prays that a Writ of Certiorari issued to review the judgment order of the United States Court of Appeals for the Third Circuit, entered in the above case on March 24, 1975.

OPINIONS BELOW.

The decision and order of the District Court for the Eastern District of Pennsylvania, printed in Appendix A, is reported at 381 F. Supp. 770 (E. D. Pa. 1974). The judgment order of the United States Court of Appeals for the Third Circuit was entered in March 24, 1975 is printed at Appendix B hereto and is unreported.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Was it not error to deny a longshoreman a claim for breach of the warranty of seaworthiness and a claim based on maritime negligence, wherein his injuries occur on the pier as a result of an appurtenance of a vessel wherein the jury found said vessel to be unseaworthy by reason of an improper method of operation involving an appurtenance and wherein the jury found said shipowner to be negligent by reason of their conduct in failing to remedy the improper method of operation.

2. Was it not error to deny plaintiff longshoreman a verdict on a finding of negligence by a jury wherein the locus of the accident was on the pier, but nevertheless involved an appurtenance of the vessel and the finding would be consistent and mandated by the common law of the place of the tort.

STATUTES INVOLVED.

The statutory provisions involved are Article III of the United States Constitution (Appendix C); the statutory provisions of 28 U. S. C. § 1332 (Appendix D); the statutory provisions of the Admiralty Extention of Jurisdiction Act, 46 U. S. C. § 740 (Appendix E).

STATEMENT OF THE CASE.

On July 8, 1970 and at all times applicable hereto, Charles Mascuilli, age 35, was employed by Atlantic & Gulf Stevedores as a longshoreman, assisting in loading and discharging cargo from the S. S. Executor, a vessel owned and operated by American Export Isbrandtsen Lines, Inc. On the morning of July 8 at approximately 8:00 to 9:00 a.m., piles of unbanded dunnage of varying lengths and sizes (21a, 24a) were removed from that vessel by holdmen at hatch no. 1 (17a, 20a, 28a) and placed on pier 40, south wharves, Philadelphia. The term "dunnage" refers to lumber owned by the shipowner and used to construct floor supports for cargo. The dunnage had been loose while on board the vessel (17a) and likewise when it was placed on the pier it was in an unbanded condition (25a, 28a). It was removed bound only by lumber bridles (28a, 29a, 30a), straps which pull tight when the load is lifted and slacken when the load is placed down.

The dunnage was to be used later in the day in the aft part of the vessel to make a floor on the ship's bottom to store a cargo of drums (22a, 24a). At approximately 2:00 o'clock in the afternoon, Elton Grogans, a chisel (forklift) operator from a gang operating in the aft part of the vessel, was instructed by his gang boss to pick up the dunnage in front of hatch no. 1 (27a) and bring it aft (32a). He placed the dunnage on the forks of his truck, and proceeded to drive with it. In the course of transportation, his truck hit a one-inch switch (26a) and because the dunnage was not secured (22a), several boards fell off and struck the plaintiff, causing him serious and disabling injury, in the nature of a herniated disc, as a result of which he has been unable to return to work since the accident, and is permanently disabled.

Action was brought by plaintiff alleging unseaworthines and negligence on the part of the vessel owners.

Jurisdiction was based upon diversity of citizenship and/or the general admiralty powers of the court. The vessel owners joined the stevedore-employer as third party defendants. Captain Ash, plaintiff's expert, provided testimony regarding the control the ship retains over dunnage throughout the entire cargo operations, and discussed the relevant longshore regulations as they provided a duty of care owned by the shipowner (33-34a, 36-38a, 40-41a).

The action was presented to a jury. At the conclusion of the trial, the trial judge submitted a series of special interrogatories to the jury (45a) which established the following (Appendix A, 381 F. Supp. at 780-2):

(1) The dunnage was the property of the shipowner;

(2) the shoreside method of operation by the stevedore was improper;

(3) The shipowner was negligent in failing to eliminate the improper pierside method of operation by the stevedore;

(4) Plaintiff was not guilty of contributory negligence;

(5) The stevedore's shipside method of operation in discharging the dunnage from the vessel to the pier was not negligent;

(6) The shipowner was not negligent in failing to eliminate an improper shipside method of operation by the stevedore;

(7) Elton Grogans (chisel operator), plaintiff's co-employee, was not negligent;

(8) The stevedore breached its warranty to perform its job in a workmanlike manner.

On the basis of these findings, the court molded a verdict for the defendant on the basis that the law did not sustain plaintiff's theories that (1) the improper pierside method of operation of the stevedore in handling the dunnage on the pier rendered the ship unseaworthy, and (2) the shipowner's failure to eliminate the stevedore's improper pierside method of operation constituted negligence under both maritime and common law principles. Plaintiff submitted a post-trial motion to remold the verdict in his favor. The motion was denied on August 23, 1974.

An appeal was taken to the United States Court of Appeals for the Third Circuit and the District Court's findings sustained (Appendix B). It is from that Order that petitioner seeks this Writ.

REASONS FOR GRANTING THE WRIT.

1. Wherein a Longshoreman Is Injured in a Pierside Accident Involving an Appurtenance of the Vessel, and a Jury Finds an Improper Method of Operation, and the Vessel Owner's Negligence in Allowing the Improper Method of Operation to Occur, Does Not *Gutierrez v. Waterman Steamship Co.*, 373 U. S. 206 (1963) Dictate Maritime Jurisdiction and a Verdict for the Longshoreman on the Breach of the Warranty as Well as the Maritime Negligence Count?

It has long been recognized that the laws of admiralty [1] are to be liberally construed to effectuate their beneficient

1. The Constitution of the United States, Article III, Section 2 (Appendix C), empowers the courts to decide "all cases of admiralty and maritime jurisdiction", and vests in the courts the power to define the scope of that jurisdiction. Initially, the courts adhered strictly to a test of situs, requiring an injury to have occurred on navigable waters for maritime jurisdiction to attach. *The Plymouth*, 70 U. S. 20 (3 Wall. 1886). This view remained virtually unaltered until 1943, when the Supreme Court permitted an injured seaman the right to maintenance and cure based solely upon the status of seamen, and not the situs of his injury. *O'Donnell v. Great Lakes Dredge and Dock Co.*, 318 U. S. 36 (1943). Soon afterwards, in 1948, the 80th Congress acted to bring admiralty jurisdiction ashore with the passage of the Extension of Admiralty Jurisdiction Act, 46 U. S. C. § 740 (Appendix E), which granted to the federal district courts the jurisdiction to decide "all cases of damage or injury to persons or property caused by a vessel on navigable waters, notwithstanding that such damage or injury be done or consummated on land."

As the concept of maritime jurisdiction was evolving, so too was the doctrine of seaworthiness, which had its historic beginnings in the recognized duty of a shipowner to supply a vessel fit for its intended purpose. *The Cyrus*, 7 Federal Cases 755 (D. Pa. 1789). The modern doctrine derives from a Supreme Court decision in *The Osceola*, 189 U. S. 158 (1903), wherein a seaman could recover for injuries sustained as a result of his employer's supplying him with an unseaworthy vessel. In 1946, the Supreme Court held that the warranty of unseaworthiness extended to longshoremen. *Seas Shipping Co. v. Sieracki*, 328 U. S. 85 (1946) and *Swanson v. Marra Bros., Inc.*, 328 U. S. 1 (1949).

In addition to the doctrine of seaworthiness, an alternative maritime theory of recovery in negligence has been recognized to impose

purposes. *Ruggiero v. Rederiet for M/S Marion* (D. C. N. Y. 1970), 308 F. Supp. 798; *Candado Stevedoring Corp. v. Lowe* (2nd Cir. 1936), 85 F. 2d 119. The applicability of maritime principles in a given case is limited by jurisdictional requirements. This relationship between admiralty jurisdiction and the maritime substantive law was not clearly defined until *Gutierrez v. Waterman Steamship Corp.*, 373 U. S. 206 (1963), and clarified in *Victory Carriers, Inc. v. Law*, 404 U. S. 202 (1971). In *Gutierrez*, recovery was allowed under both unseaworthiness and negligence theories for a longshoreman injured on the pier as the result of the spillage of beans which were part of the defective stow of the vessel. This court stated at p. 210:

> "The case is within the maritime jurisdiction under 46 U. S. C., § 740 when as here, it is alleged that the shipowner commits a tort while or before the ship is being unloaded, and the impact of which is felt ashore at a time and a place not remote from the wrongful act."

In *Victory Carriers, supra*, recovery was denied for the specialized circumstance of an injury suffered pierside during cargo operations which was caused *by defective stevedore's equipment found not to be an appurtenance of the vessel.* Plaintiff was therein injured by a defective forklift truck which had been supplied by his employer for his pierside use. The action was predicated only upon unseaworthiness, based upon the fact that plaintiff was engaged

1. (Cont'd.)

a duty upon a shipowner to provide the crew of a vessel and shoreside workers with a reasonably safe place to work. *Pope and Talbot Inc. v. Hawn*, 346 U. S. 406 (1953). Seamen were given the right to plead simultaneously counts of unseaworthiness and negligence since the remedies were held not to be mutually exclusive in *McCarthy v. American Eastern Corp.*, 175 F. 2d 724 (3rd Cir. 1949). Longshoremen likewise have been permitted to plead them separately. *Lusich v. Bloomfield Steamship Co.*, 355 F. 2d 770 (5th Cir. 1966).

in the maritime task of unloading cargo on board a ship on navigable waters at the time of the injury. The court, in rejecting plaintiff's plea for admiralty jurisdiction, applied the situs test and emphasized the plaintiff's injury was not caused by an appurtenance of the vessel so as to bring it within the purview of the Admiralty Extension of Jurisdiction Act.[2] The Court reaffirmed the *Gutierrez* holding by stating:

> "The decision in Gutierrez turned not on the 'function' the stevedore was performing at the time of his injury, ***but, rather upon the fact that his injury was caused by an appurtenance of the ship,*** the defective cargo containers, which the Court held to be 'an injury to person . . . caused by a vessel on navigable waters' which was consummated ashore under 46 U. S. C., § 740." 30 L. ed. 2d at p. 390. (Emphasis supplied.)

It is upon this basis that cases subsequent to *Victory Carriers* have denied admiralty jurisdiction where injuries suffered pierside were caused by an instrumentality not part of the ship's gear, not under its control, or not aboard or stored on the vessel. See *Edward McGrath v. M/V Reederij "Nautiek" and W. Buhmer's Scheepvaarbedrijf v. Stockard Shipping Terminal Company,* C. A. No. 70-3361 (75a); *Frank Cooper v. Australian Coastal Shipping Commission and the Australian National Line v. J. A. McCarthy, Inc. and Rainbow Terminal Corp.,* C. A. No. 68-2676 (85a).

In the instant case the jury specifically found in interrogatory no. 1 that the instrumentality of the injury, the dunnage, was an appurtenance of the vessel and that it had

2. This jurisdictional requirement should be considered in conjunction with the more recent Supreme Court decision which discouraged exclusive reliance on the locality rule in determining admiralty jurisdiction. *Executive Jet Aviation Inc. v. City of Cleveland,* 409 U. S. 249 (1972).

left the ship's hold that morning and would be returned to the ship's hold later in the day.[3] Admiralty jurisdiction is thereby established. Assuming the District Court's interpretation of *Victory Carriers* is correct, a view plaintiff contests, plaintiff submits the District Court judge below confused the concepts of jurisdiction with the merits of plaintiff's negligence and unseaworthiness claims. The District Court distinguishes *Gutierrez* and the line of cases after it by finding that there a defective appurtenance possessed such defect while on board the vessel itself and held:

> "This fact is crucial to the decision in that case." (381 F. Supp. at 774) (Appendix A)

The District Court then goes on to state "the plaintiff here has not cited to us, and we have been unable to find, a single case applying the law of the sea to a longshoreman injured while working on the pier by an appurtenance of the vessel which was removed from the vessel and which was wholly fit when removed but rendered unfit by the stevedore after it was placed on the pier and detached from the ship's tackle." (381 F. Supp. at 774) (Appendix A). Though plaintiff's factual situation is unique, there is no language in *Victory Carriers, supra* to intimate that a defect of an appurtenance must exist on board the ship itself; rather, the court has established the character of the instrumentality of the injury to be determinative of the jurisdiction issue without further qualification, i.e., solely upon whether it is or is not an appurtenance of the vessel. The court then cites *Snydor v. Villian and Fassio Et Compania Internazionale de Genova Society Reunite Di Naviagaione S. P. A.*, 459 F. 2d 365 (4th Cir. 1972) for approval of its

3. The Lower Court specifically found the dunnage to be an appurtenance of the vessel and so instructed the jury. See opinion of lower court (Appendix A) (381 F. Supp. at 372).

conclusion. Plaintiff there was injured in the second floor of a pier shed while spotting palletized cargo. Plaintiff alleged but failed to prove that the cargo, admittedly an appurtenance, was defective while on board ship. That court stated:

> "We are unpersuaded by this theory advanced for the first time in the appellant's brief in this court" (459 F. 2d at 368).

It was held that plaintiff failed to prove such a shipboard defect. Though the court holds such proof essential to sustain maritime jurisdiction, it cites no authority, merely relying on the fact that in *Gutierrez* such a defect was present.[4] However, *Gutierrez* in no way mandated such a prerequisite to jurisdiction, and no subsequent case has so held. Factually, the case is easily distinguishable. In *Snydor,* plaintiff was not involved in a longshore gang which was engaged in loading or unloading operations; Charles Mascuilli had that status. Negligence of the forklift operator was found in *Snydor;* it was found specifically not to have existed in the case at bar. *No testimony was introduced in Snydor regarding the control retained by the shipowner and likewise there was no jury finding supporting the vessel's involvement, unlike the instant case.* Additionally, in *Snydor* the pallet involved was not going to be placed back aboard the ship and thus was no longer an appurtenance of the vessel. Finally, plaintiff failed to raise the issue in the trial court. Because Mascuilli has demonstrated his injury was caused by an appurtenance of the vessel during unloading operations, he is entitled to invoke maritime law in seeking his remedy.[5]

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4. The court does not cite *Victory Carriers, supra.*

5. In approval is the language in *In Re Dearborn Marine Service, Inc.,* 499 F. 2d 63, 274 (1974) referring to the Admiralty Extension of Jurisdiction Act:

> "This statute applies to give admiralty jurisdiction over *pierside injuries caused by the vessel's hull, gear or cargo.* See *Gutierrez*

It was plaintiff's right therefore to invoke the remedies provided by the doctrine of unseaworthiness and maritime negligence.

In the special interrogatories 3(b) nos. 1 and 2 which were answered affirmatively by the jury, the shipowners were found specifically to have been negligent in failing to eliminate an improper pierside method of operation by the stevedores in their handling of the unbridled dunnage, which in turn was found to proximately cause plaintiff's injury. A duty of due care has long been recognized in the

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5. (Cont'd.)

v. Waterman Steamship Corp., 373 U. S. 206, 83 Supr. Ct. 1185, 10 Lawyers Edition 2d, 297 (1963), explained in *Victory Carriers v. Law*, 404 U. S. 202, 209-10, 92 Supr. Ct. 418, 423-24." (Emphasis supplied.)

Likewise, the Fourth Circuit in *Garrett v. Gutzeit O/Y*, 491 F. 2d 228 (4th Cir. 1974) applied admiralty jurisdiction to an action by a longshoreman injured on the dock when, while using hand hooks to handle bails that had come from the vessel, a band broke. In reconciling *Gutierrez* and *Victory Carriers*, the Court stated:

> "Naturally, *Gutierrez* had an expansive effect on the scope of the jurisdiction in admiralty cases. In *Victory Carriers* the court clarified the scope of this jurisdiction as broadened by *Gutierrez* in its application of the act . . . In denying recovery against the shipowner, the court stressed that the plaintiff was not injured by an appurtenance of the ship, an essential element if admiralty jurisdiction is to be invoked under the act . . . The court stated that reliance upon the 'gangplank line' as the presumptive boundary of admiralty jurisdiction is best, except for cases where ship's appurtenances cause damage ashore. Thus, *Victory Carriers* and *Gutierrez* read and considered together, combine to formulate the following rule: Admiralty jurisdiction extends to shorebased workers who are injured by an appurtenance of the ship *at a time and place not remote from the wrongful act of the shipowner*. It must be remembered, however, that the court in *Victory Carriers* addresses itself only to jurisdiction. We do not interpret *Victory Carriers* to affect in any way the limits of warranty coverage." 491 F. 2d at 232. (Emphasis supplied.)

Snydor, supra, can thus be further distinguished from the instant case in that in *Snydor*, the accident occurred at a time and place remote from the shipowner's wrongful act.

maritime law as a concept severed from unseaworthiness,[6] which requires reasonable supervision by the shipowner during unloading to correct or prevent discoverable improper operations. Its nature is described in *Earle v. Union Barge Line Corp.*, 486 F. 2d 1097 (3rd Cir. 1973).

> "The language used by the Supreme Court in cases which discuss the negligence of the vessel owner and the stevedore employer are illustrative of the fact that the ***duty to use reasonable care to provide a safe place to work*** is found in the law of negligence and not in the law of the warranty of unseaworthiness." (Emphasis supplied) (486 F. 2d at 1104)

Assuming arguendo, the plaintiff's negligence claim must rest upon maritime jurisdiction for the plaintiff to recover, by virtue of the court's interrogatory at issue, such maritime jurisdiction was clearly met in the instant case.[7]

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6. In *Lusich v. Bloomfield Steamship Co.*, 355 F. 2d 770 (5th Cir. 1966), there was an erroneous withdrawal of the negligence theory from the jury and the court found this to be reversible error. The court further stated the following: "While it has been accepted that unseaworthiness and negligence overlap to a great extent in this kind of case, they are recognized as independent grounds of recovery; and a party relying upon both of them as support for his claim has a right to an independent submission of the negligence theory to the jury. *Prudential Insurance Co. of America v. Morrow* (5th Cir. 1965), 339 F.2d 411. Otherwise, such a party's right of action based on negligence could always be 'blotted out' by charging the jury only on seaworthiness. *Weyerhaeuser v. Nacirema Operating Co.*, 355 U. S. 563 (1958), is an example of a recent case where the plaintiff recovered on the theory of negligence when the jury found against him on the issue of unseaworthiness." 355 F. 2d at 744.

7. Even the recent Amendment to the Longshoreman and Harbor Worker's Act which limited a shore-based maritime employee right to recovery on unseaworthiness recognized this cause of action for negligence. 33 U. S. C. A. § 901, et seq.

In a case closely akin to the instant case wherein injuries were sustained by a longshoreman working on the pier as the result of

At trial in the present case, there was manifold testimony indicating that the dunnage was an appurtenance and the defendant was negligent in not correcting an unsafe pierside method of operation.[8]

It was error for the trial judge to mold the defendant's verdict in favor of American Export Lines, Inc. in light of

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7. (Cont'd.)

allegedly defective pallets of the ship, Judge Charles R. Weiner of the Eastern District of Pennsylvania, stated:

> "The defendant argues that as this was a pierside accident, maritime jurisdiction is wanting . . . We disagree and believe that since this accident was attributed to the negligence of the shipowner, and may have been caused by the use of defective equipment, we find admiralty jurisdiction exists and maritime law controls." *Trottie v. United Philippine Lines, Inc. v. Atlantic and Gulf Stevedores, Inc.*, C. A. No. 72-1767 (87a).

8. It was testified that the dunnage was originally scattered on the floor of the hold of the ship (17a) including dunnage of several different dimensions (18a). It was bound only with lumber bridles for removal (19a) when made up into drafts, though rope had been asked for to bind it by longshoreman Rutter (20a). Deckman Fitzmaurice testified the holdmen had requested rope slings for the unbanded dunnage which he relayed to his foreman, Mickey Coyle, who told him to remove the remaining dunnage drafts from the hatch despite the lack of banding (28a). Fitzmaurice further testified that it was the usual practice to use rope slings when removing dunnage draft (29a). Melko concurred in stating that banding was the safest way to handle the draft (30a). Grogans, the chisel operator, testified that the dunnage was removed to be used in the aft part of the vessel to make a floor on the ship's bottom to store drums (24a). Rutter also testified that the lumber was brought back on board at the end of the day (22a). Captain Ash, plaintiff's maritime expert, explained the myriad uses of dunnage and stated that dunnage is possessed by every steamship company. He also stated that the type and manner of use of dunnage is determined by the master and officers of the vessel (31a, 32a). He explained further that without rope slings dunnage held tight by lumber bridles would tend to loosen and untie once it comes to rest on the pier when the load slackens (42a). He explained that it is the master and ship's officers who are in charge of cargo operations on a merchant vessel (41a) and stated that the method of discharging and reloading the dunnage in this case was not a safe and proper method (41a). In essence, therefore, the jury's holding that the dunnage was an appurtenance established maritime jurisdiction under *Victory Carriers* and they could properly have held the defendant was liable in negligence.

the often repeated theory, restated in *McNeil v. A/S Havtor v. Independent Pier Co.*, 326 F. Supp. 226 (E. D. Pa. 1971), where a longshoreman was injured on the pier when his lift truck struck an object on the pier shed floor:

> "The shipowner owes a non-delegable duty to longshoremen working in the service of his vessel to provide them with a reasonably safe place to work, regardless of whether the shipowner has control over the pier. *Gutierrez, supra; Thompson v. Calmar Steamship Corp.*, 331 F. 2d 657, 661 (3rd Cir. 1964). Failure to provide a reasonably safe place to work would constitute negligence. *Beard v. Ellerman Lines, Ltd.*, 289 F. 2d 201 (3rd Cir. 1961) . . . The failure to forbid the use of loading and unloading methods by the stevedore which did not comply with the standard of reasonable care may constitute negligence. *Beard, supra.* Whether defendant breached its duty as aforementioned is not for the court to decide, but rather is a question of reasonableness appropriate for the jury's determination." (326 F. Supp. at 230).[9]

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9. McNeil is being herein cited for its statement of the law of negligence. It has been overruled in part by *Victory Carriers, supra.* See also *Ballwanz v. Isthmian Lines, Inc.*, 319 F. 2d 457 (4th Cir. 1963); *Morales v. City of Galveston*, 370 U. S. 165, 8 L. Ed. 2d 412 (1962); *Venable v. A/S Det Forenede Dampskibsselskab*, 399 F. 2d 347 (4th Cir. 1968); and *Fisher v. U. S. Lines Co.*, 198 F. Supp. 815 (E. D. Pa. 1961), where drafts which were being unloaded from the ship were swinging at least ten feet inside the pier shed, and one load struck and injured plaintiff. The winches and booms of the ship were being used in the unloading process. The court upheld, on post-trial motions, a plaintiff's verdict, stating:

> "The shipowner has a duty not to permit its ship's unloading activities which can affect people on the pier to be carried on in a way that subjects those people in the area of these activities to an unreasonably risk of harm, see § 371 of the Restatement of Torts; *Robillard v. A. L. Burbank & Co., Ltd.*, D. C. S., D. N. Y. 1960, 186 F. Supp. 193, 196-197."

In *Arthur v. Flota Mercante Gran Centro Americana S. A.*, 487 F. 2d 561 (5th Cir. 1973), the court held that breach of longshore regulations constituted negligence per se. In the instant case,

Having satisfied the requisites of *Victory Carriers, supra*, by proving the dunnage was an appurtenance of the vessel, plaintiff has also established an unseaworthiness claim under the doctrine described in *Thompson v. Calmar Steamship Corp.*, 331 F. 2d 657 (3rd Cir. 1964), cert. den. 13 L. ed. 2d 184.[10] In that case, plaintiff was injured when the vessel's engines and lines were used to move freight cars on the pier to position them for loading operations and plaintiff was thrown from one of the moving cars. The court stated:

> ". . . it is necessary that the owner of the ship is liable to indemnify a seaman for an injury caused by the unseaworthiness of the vessel and its appurtenant appliances and equipment and it has been settled law in the country ever since *The Osceola* . . . there can be no dispute also, that longshoremen engaged in the services of the ship are entitled to the same protection against unseaworthiness which members of the ship's crew would enjoy. . . . Further, the unseaworthiness of the vessel and its equipment may arise from acts of a longshoreman, crew or indeed of the injured longshoreman himself. *Grillea v. United States*, 232 F. 2d 919 (2nd Cir. 1956); *Knox v. United States Lines, Co.*, 294 F. 2d 354 (3rd Cir. 1961); *Smith v. Lauritzen*, 201 F. Supp. 663 (E. D. Pa. 1962) (331 F. 2d at 659).
>
> If the longshoreman is actually engaged in the service of the ship, it is immaterial whether the accident caused

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9. (Cont'd.)
the applicable regulations were submitted to the jury and could have formed the basis for their findings of negligence (37a-39a). Plaintiff was therefore entitled to a judgment in his favor on the issue of maritime negligence.

10. See *American Export Lines, Inc. v. Revel*, 266 F. 2d 82 (4th Cir. 1959) which indicates that plaintiff's lacking of federal unseaworthiness claim may have one under the laws of Virginia.

> by the vessel's unseaworthiness occurs away from the ship or on the pier. *Gutierrez v. Waterman Steamship Corp.*" (331 F. 2d at 659).

In *Burns v. Anchor-Wate Co.*, 469 F. 2d 730 (5th Cir. 1973) in which a pipe company employee was injured while assisting in the loading of pipes, due to the unsafe use of the crane as the result of poor visibility and the absence of flagmen, the court found unseaworthiness based upon the failure to correct an unsafe method of loading and unloading in a decision which was subsequent to *Victory Carriers.*

> "But insofar as the characteristics of the shore based crane presented hazards which ought reasonably to be foreseen in the loading/unloading of the heavy pipe, the absence of such safeguards could render the barge unseaworthy because of the continued employment of the unsafe method of loading/unloading. *D/S Ove Skou v. Hebert,* 5th Cir. 1966, 365 F. 2d 341, 1966 A. M. C. 447; *Mills v. Mitsubishi Shipping Co.,* 5th Cir. 1966, 358 F. 2d 609, 1966 A. M. C. 1318; *Price v. S. S. Yaracuy,* 5th Cir. 1967, 378 F. 2d 156 . . . [and] the result would depend on a number of variables and would ordinarily call for a resolution by the trier of fact . . ." 459 F. 2d at 733-34.

See also *Giddens v. Isbrandtsen Co., Inc.*, 355 F. 2d 125, 127 (4th Cir. 1966); *McCown v. Humble Oil and Refining Co.*, 405 F. 2d 596 (4th Cir. 1969); *Gebhard v. S. S. Hawaiian Legislator,* 425 F. 2d 1303 (9th Cir. 1970).

In *Griffin v. U. S.*, 469 F. 2d 671 (9th Cir. 1972) a longshoreman sued for an eye injury sustained when he was struck by an unidentified falling object dislodged near the top of a ladder he was climbing behind a fellow worker, and the court stated:

> " . . . an unseaworthy condition that causes no damage until brought into play by the negligence of a longshoreman employed by the stevedore is nonetheless an unseaworthy condition in the workman's action against the shipowner. E.g. *Alaska Steamship Co. v. Garcia,* 378 F. 2d 153 (9th Cir. 1967)." 469 F. 2d at 672.

Also see *Tucker v. Calmar Steamship Corp.*, 457 F. 2d 440 (4th Cir. 1972), in which Judge Sobeloff in footnote no. 1 attempted to resolve *Gutierrez* and *Victory Carriers,* and held that plaintiff-longshoreman's pier sustained injury due to the unreasonable use of ship's gear in loading operations brought the case within the purview of the Admiralty Extension Jurisdiction Act.

> ". . . The Supreme Court defined the outer limits of § 740 in *Victory Carriers v. Law,* 404 U. S. 202 . . . *Victory Carriers* held that a longshoreman working on the pier, when injured by *shore-based* equipment could look only to state law for recompense. *Gutierrez's* use of § 740 was again specifically approved, but the two cases were distinguished. In *Gutierrez,* the injury was traceable to defects in appurtenances of the ship and its unfitness for unloading, while in *Victory Carriers* the defect was shore based machinery. As will appear infra, the proximate cause of Tucker's injuries was the unreasonable use of the ship's gear in loading operations, bringing the case within the rule of *Gutierrez* and the purview of § 40." 457 F. 2d at 452.

In *Garrett v. Gutzeit O/Y, supra,* the court stressed that the decision in *Victory Carriers* only applied to jurisdiction and did not in any way affect the scope of the unseaworthiness warranty coverage. The *Garrett* court further cites with approval *Hagans v. Ellerman and Bucknall Steamship Co.,*

318 F. 2d 563 (3rd Cir. 1963), in which a longshoreman's claim was upheld prior to the *Victory Carriers'* decision when a longshoreman was injured by slipping on sand in a piershed, and states in reference to that case:

> "In *Hagans v. Ellerman & Bucknall Steamship Co.*, 318 F. 2d 563 (3rd Cir. 1963), the court upheld the recovery by the claimant-longshoreman for injuries sustained while stacking cargo at a pier building after the cargo was just discharged from the ship's hold and carried by truck to the building. The court found the work was 'an integral part of the unloading of the vessel', since the pier apron could not accommodate the cargo. 318 F. 2d at 571. Thus, the court concluded that 'as a matter of law he was in the ship's service' and was entitled to the 'protection of the doctrine of unseaworthiness.' 318 F. 2d at 571, see also *Huff v. Matson Navigation Co.*, 338 F. 2d 205 (9th Cir. 1964) and *Spann v. Lauritzen*, 344 F. 2d 204 (3rd Cir. 1965). *Chagois v. Lykes Bros. Steamship Co.*, 432 F. 2d 388 (5th Cir. 1970) upheld an award of damages to a longshoreman on the pier adjacent to a ship while transferring grain from a box car to the ship; Chagois was engaged in 'an essential part of the unbroken sequence of moving the . . . [cargo] from the pier to the ship.' 432 F. 2d at 391 (footnote omitted)." 491 F. 2d at 235.

The jury's answer to interrogatory 2(b)(1) and (2) indicates the stevedore's use and improper method of operation in handling the dunnage on the pier. It is apparent in light of *Tucker, supra,* and *Burns, supra,* that liability on the basis of the warranty of unseaworthiness is applicable for failure to correct the improper method, and it was therefore error for the trial judge to mold the defendant's verdict on that issue.

2. Wherein a Longshoreman Sues a Vessel Owner Under 28 U. S. C. § 1332 and Establishes Diversity of Citizenship, Is He Not Entitled to a Verdict on a Finding of Negligence Under the Common Law of the State in Which the Tort Occurs Wherein His Injuries Occur on a Pier During the Course of His Employment?

Plaintiff established an alternative basis for federal jurisdiction under 28 U. S. C. § 1332, diversity of citizenship (Appendix D). Even if the lower court was correct therefore in finding that maritime jurisdiction and/or maritime substantive law is inapplicable, plaintiff should have been granted judgment under state concepts of common law negligence.[11] Unlike the seaman who is suing his employer and had no remedy for negligence until the Jones Act, the longshoreman always had his state created negligence count since he, in essence, was always suing a third party for injuries sustained when he brought suit against the vessel.[12]

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11. Although the court made a limited common law negligence charge, there was enough to support the jury findings.

12. Plaintiff longshoremen do not lose state rights as against third parties merely because of the liberal maritime concepts. Admiralty counts have in fact traditionally applied state law. See *Agwidale*, 61 F. Supp. 191 (S. D. N. Y. 1945), wherein the law of the port where an injury occurred was applied to a longshoreman's action. Also see *Fueh v. Kupper*, 1960 A. M. C. 2161, 2168, Superior Ct., N. J.; *Lascovich v. S. S. Samovar*, 1947 A. M. C. 1046, 1057 (N. D. Ca. S. D.); *Streatch v. Ass. Container, et al.*, 388 F. Supp. 935 (C. D. Cal. 1975).

The applicability of common law negligence principles to a seaman's personal injury actions was sustained in *Leach v. Mon River Towing, Inc., et al. v. Campbell Barge Lines, Inc.*, 363 F. Supp. 637 (W. D. Pa. 1973). Plaintiff was a towboat employee and was injured while he was working as a deckhand when he was thrown to the bottom of an empty barge. The court denied summary judgment based on defendant charterers' and owners' claim that a release signed by plaintiff and in favor of the towboat operator released them from liability. The complaint was framed in both negligence and unseaworthiness. The court states:

"If the plaintiff proved liability solely on the theory of negligence, then the parties are all entitled to look to the law of the

In *Chagois v. Lykes Bros. Steamship Co.*, 457 F. 2d 343 (5th Cir. 1972), plaintiff longshoreman was injured while working on the pier during loading operations as a result of defective equipment supplied by his stevedore-employer. The Fifth Circuit originally held that the doctrine of seaworthiness applied and sustained that lower court's finding in favor of the plaintiff (432 F. 2d 388, 1970). The defendant appealed and on January 10, 1972, the Supreme Court vacated the original decision and remanded for further consideration in light of *Victory Carriers, Inc., supra.* On remand, the Fifth Circuit did not dismiss the complaint through recognizing plaintiff no longer had a maritime cause of action. The court intimated plaintiff could still proceed under diversity jurisdiction if he could present a claim under state law. The court stated:

> "Chagois, may, however, have another cause of action cognizable in Federal Court or may be able to sue in Federal Court based upon jurisdiction independent of

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12. (Cont'd.)

state in which the action is being tried—here, the law of Pennsylvania." (363 F. Supp. at 641)

Likewise in *Scoggins v. Sea-Land Service, Inc.*, 340 F. Supp. 1100 (E. D. Va. 1972) wherein an accident occurred thirty miles from defendant's vessel, the court granted summary judgment on an unseaworthiness claim but denied it as to plaintiff's negligence claim, stating:

> "Under the reasoning of *Victory Carriers, Inc. v. Law* we grant the defendant's motion for summary judgment as it applies to the unseaworthiness contention, because it appears from the pleadings, depositions and affidavit that maritime jurisdiction is not applicable to this case, and Sea Land is entitled to judgment on that issue as a matter of law.
>
> The second contention of the plaintiff is that Sea Land was negligent in not providing him with a safe place to work. This issue involves a number of factual determinations that could only be borne out through evidence introduced in a trial proceeding. Consequently, the defendant's motion for summary judgment on the issue of negligence is denied." 340 F. Supp. at 1102.

28 U. S. C. 1333. We leave this determination to the District Court in the first instance." (457 F. 2d at 345)

In the case at bar, the court further erred in molding a defendant's verdict when the facts of the case and the judge's charge included a common law negligence standard compatible with the jury's findings (43a, 44a), wherein the court's charge stated in essence:

". . . negligence is the want of due care under all the circumstances." [13]

In a most recent decision, *Lopez v. Delta Steamship Lines, Inc., et al.*, 387 F. Supp. 955 (D. Puerto Rico, 1974), Chief Judge Toledo held that a longshoreman injured on a pier, working for an independent stevedore, transporting cargo to a warehouse, was engaged in inherently dangerous work and, as such, was entitled to a verdict as against the steamship company since under the law of the Commonwealth of Puerto Rico, said steamship company was liable since a steamship company under said state law, has a primary non-delegable liability in case of the negligent acts of its independent contractors (387 F. Supp. at 957). Interestingly enough, this is the very law of the Commonwealth of Pennsylvania applicable to the instant case.

The applicability of the negligence concept to employers of independent contractors under Pennsylvania State Law is described in the recent decision of *McDonough v. U. S. Steel Corp.*, 228 Pa. Super. 268 (1974). In that case, plaintiff's decedent was employed by Langenfelder Co. which was in turn an independent contractor of U. S. Steel. Plaintiff's decedent was killed while piling defendant's iron

13. The charge also included the following: "Negligence members of the jury, is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, when prompted by considerations which ordinarily regulate the conduct of human affairs." (43a).

ore when the machine he was using went over an edge of the pile, allegedly because the lighting was insufficient for plaintiff's decedent to judge the distance. The trial court found for plaintiff and the Appellate Court affirmed. The court reasoned:

> "Normally, an employer of an independent contractor is not responsible for the negligent acts or omissions of the contractor or its employees . . . an employer, however, must use reasonable care to make the premises safe, or warn the contractor of any dangerous conditions thereon.
>
> There are however, exceptions to this general rule of non-liability and the instant case falls within one of these exceptions. The exception does not rest upon any personal negligence of the employer, but is a rule of vicarious liability. The rule is stated in § 416 of the Restatement of Torts, 2d: 'One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.' " (228 Pa. Super. at 273-4)

Footnote 4 on page 274 of that opinion states the section renders irrelevant contract provisions placing the responsibility for all necessary safety precautions on the independent contractor.

Comment E to § 416 of the Restatement of Torts 2d, clarified the term "peculiar risk" stating:

> "It is not essential that the peculiar risk be one which will necessarily and inevitably arise in the course of the work, no matter how it is done. It is sufficient that it is a risk which the employer should recognize as likely to arise in the course of the ordinary and usual method of doing the work, or the particular method which the employer knows that the contractor will adopt." [14]

In *Halecki v. United New York and New Jersey Sandy Hook Pilots Assn.*, 302 F. 2d 840 (2nd Cir. 1962), the court permitted a recovery in negligence despite the fact that due to the nature of the services plaintiff was rendering, he was not entitled to invocation of the unseaworthiness doctrine. Plaintiff was a third party contractor's employee who met his death on defendant's vessel as a result of chemical poisoning. The trial court was directed to an earlier decision by the Supreme Court of the United States, 258 U. S. 613, holding the warranty of unseaworthiness inapplicable but directing that the case could proceed on defendant's failure to provide a safe place to work. The court stated:

> " 'The defendant didn't know how to do this work. They brought it to a shipyard. Rodermond didn't feel competent to do it so they engaged K & S, Halecki's employer. The defendant was the one that ordered this work to be done by means of the carbon tetrachloride and I charge you as a matter of law that the defendant thereafter had a duty to ascertain whether

14. The Pennsylvania Supreme Court applied § 416 in *Philadelphia Electric Co. v. Julian*, 425 Pa. 217, 228 A. 2d 669 (1967), where the independent contractor was held liable for the negligence of its sub-contractor in failing to take safety precautions to avoid damage to underground gas mains during installation of guard rails. Liability was imposed despite the fact that the employer may have relied upon the sub-contractor's knowledge of the danger, since he failed to further warn the sub-contractor.

> the sub-contractor or Rodermond was competent to do this work and they were further charged with the duty to ascertain and take reasonable steps to be sure insofar as they could that the manner and the method employed by either Rodermond or K & S was reasonably proper to keep the place in which this man had to work, reasonably safe under all the circumstances.'
>
> The main thrust of the instructions, and the context in which this portion thereof must be read, is that Halecki was a business invitee, that the shipowners owed him a duty to exercise reasonable care to furnish him with a reasonably safe place in which to work.
>
> The directions given by the Supreme Court in this case are simple and clear. 'The defendants owed a duty of exercising reasonable care for the safety of the decedent.' 358 U. S. at pp. 618-619, 79 Supr. Ct. at p. 520: '*It was for the triers of fact* to determine whether the defendants were responsibly negligent in permitting or authorizing the method or manner of its [carbon tetrachloride] use.' " 302 F. 2d at 841.

In the case at bar, the jury specifically found the existence of a duty, and its breach. That finding should not be disturbed. See *Spinozzi v. E. J. Lavino & Co.*, 243 F. 2d 80 (3rd Cir. 1957), wherein an earth wall of a construction trench collapsed and suit was brought against the corporation which had contracted with the decedent's employer to perform this excavation work at defendant's premises. Decedent's employer was to furnish equipment and perform excavation work to the specifications provided by the defendant. The court stated:

> "It is apparent that where the employer has retained some element of control of the job, he should be responsible for the harmful consequences of its perform-

ance as a concomitant of the control retained . . . *it is the jury's function to determine whether the employer retained control so as to make him liable.*" 243 F. 2d at 83. (Emphasis supplied.) [15]

By virtue of the jury's finding of shipowner pierside negligence in interrogatory 3(b)(1) and (2), a verdict for the plaintiff should have been instituted under state law.

3. The Determination of the Issues of Negligence and Unseaworthiness Are in the Paramount Province of the Jury and It Was Error for the Court to Disturb Them.

The existence of negligence is consistently viewed as a question of fact to be determined preeminently by a jury. *U. S. Steel Co. v. Olewinski,* 235 F. 2d 326 (6th Cir. 1956); *Lee v. Pennsylvania Railroad Co.,* 192 F. 2d 226 (2nd Cir. 1951); *Born v. Osendorf,* 329 F. 2d 669 (8th Cir. 1964).

"In a negligence case the function of a jury is not merely to determine the basic facts upon conflicting evidence; it is the jury's function to determine the appropriate rule of conduct for the particular circumstances found to have existed." *Foster v. Sol Greisler,*

15. See also *Guinones v. Township of Upper Moreland,* 293 F. 2d 237, 239 (3rd Cir. 1961) where plaintiff's decedent was killed while excavating a trench which caved in. The township was authorized to make inspections to insure compliance with Pennsylvania law and regulations. The court thus stated:

"In finding against Township with respect to plaintiff's verdict, the trial judge held that there was sufficient evidence to sustain the jury's finding 'that township had retained sufficient control [with respect to the contractor's performance] to make it liable for the absence of shoring.' In doing so he pointed to the fact that the failure to provide shoring was in violation of a Pennsylvania statute and regulations of the Pennsylvania Department of Labor and Industry." (293 F. 2d at 239).

See also the portion of Captain Ash's testimony regarding the longshore regulations introduced (33a-41a).

Inc., 150 Pa. Super. 509, 511 (1941); *Lobianco v. Valley Forge Military Academy*, 224 F. Supp. 395 (E. D. Pa. 1963).

The ability to make such determination has been held to be within the province of the jury even when mixed questions of law and fact are involved. *Lobianco, supra; Pennsylvania Railroad Co. v. Peters*, 116 Pa. 206, 215-16 (1887). Once the determination is so made, it can only be set aside if patently and blatantly erroneous. *Virgilia v. Walker*, 254 Pa. 241 (1916). The jury in the instant case found negligence and unseaworthiness counts based upon substantial evidence in the record and consistent with the court's charge. See *McNeil v. A/S Hauter v. Independent Pier Co., supra*, where the court states:

> "Whether defendant breached its duty (to forbid improper unloading methods of the stevedore) is not for the court to decide, but rather is a question of reasonableness appropriate for the jury's determination." 326 F. Supp. at 230.

In light of these circumstances, it was error for the court to usurp the jury's basic fact finding function and mold the defendant's verdict.

CONCLUSION.

This Court is requested to review this matter in order to clarify the distinctions in the maritime law between *Victory Carriers v. Law, supra*, and *Gutierrez v. Waterman Steamship Corp., supra*, and also to clarify the application of the common law of the state for a maritime tort where said common law is not repugnant to the maritime laws.

It is respectfully submitted that the issue herein is of great importance since *Victory Carriers v. Law* placed a limitation on the maritime law, and never intended to defeat admiralty jurisdiction, wherein an appurtenance of the vessel was involved in a pierside injury.

Respectfully submitted,

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APPENDIX A.

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

EDWARD R. BECKER, *District Judge.*

This is an action for damages for personal injuries suffered by a longshoreman when he was struck by ship's dunnage which was alleged to be improperly banded and which slid off a forklift truck which was being driven along the pier during cargo operations. After a lengthy trial on the issue of liability, the jury returned answers to 18 special interrogatories. From those answers we molded a verdict for the defendant, and it is that decision which is challenged in plaintiff's post-trial motion.[1] The case requires that we further refine, in a novel factual situation, and in the wake of the decision in Victory Carriers v. Law, 404 U. S. 202, 92 S. Ct. 418, 30 L. Ed. 2d 383 (1971), the shoreside limits of the maritime jurisdiction, which by Act of Congress, 46 U. S. C. § 740 (the Admiralty Extension Act of 1948), "shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

I. *The Facts.*

The facts surrounding the plaintiff's accident were developed at length at trial. They may be briefly summarized as follows. Plaintiff was a longshoreman em-

1. The plaintiff also moved for a new trial on the grounds that the verdict was against the weight of the evidence and the law. After reviewing the transcript, we believe that the evidence, which was basically not in dispute, overwhelmingly supports the verdict. Indeed, plaintiff did not press this aspect of the motion in his briefs.

ployed by the third party defendant Atlantic & Gulf Stevedores, Inc. ("Atlantic & Gulf"), and on the day of the accident was working in connection with the cargo operations of the defendant's vessel, the S. S. Executor. Between 8:00 and 9:00 a.m., several hours before the accident, the plaintiff's co-employees discharged from the ship several drafts or loads of dunnage, that is, assorted lumber which every ship has in its hold and which is used, inter alia, to separate cargo or make a floor to support it. Dunnage used on a ship is the property of a shipowner. The drafts of dunnage were lifted out of the hold and onto the pier by means of lumber bridles, which are two straps each having a choker device which pulls the strap tight when the load is lifted. When the dunnage was landed on the pier the lumber bridles were removed and the dunnage sat unbanded on the pier.

That afternoon it became necessary to move some of the dunnage to another place on the pier. To accomplish this, the plaintiff's co-employee, Elton Grogans, lifted a stack of dunnage on the forks of a chisel (a forklift truck) and drove the chisel along the pier. The stack of dunnage being moved by the chisel was approximately three or three and a half feet high, consisting of perhaps a few hundred sticks of lumber each about an inch thick, four to eight inches wide, and six to ten feet long. As the chisel passed near the plaintiff, a few sticks of dunnage slid off the unbanded stack to the side, striking the plaintiff and causing his injuries. The cargo operations were being performed by Atlantic & Gulf under the direction of its foremen and gang bosses. While there was testimony by plaintiff's expert, Captain William Ash, that the Master of the vessel "is in charge of cargo operations on a merchant vessel," there was no evidence that any of the vessel's personnel exercised any such control or that they were even present or in any way involved in the cargo operations in question.

Because of the complexity of the legal issues involved in the case and the variety of theories of recovery, we submitted to the jury 18 special interrogatories which addressed all of the critical facts which might affect the outcome. In this way we would be able to mold a verdict regardless of what legal principle might ultimately control. In its answers to those special interrogatories, which are attached to this Opinion as an appendix, the jury found facts which may be summarized as follows:

> 1. The dunnage striking the plaintiff was the property of the vessel and was the same dunnage that had been removed from the vessel earlier in the day by the third-party defendant's employees and placed upon the pier.[2]
>
> 2. The stevedore did not employ an improper shipside method of operation in discharging the dunnage from the ship. "Shipside" means up until the time the dunnage was released from the ship's tackle onto the pier. (The interrogatory from which this finding stems was captioned "Unseaworthiness—Shipside method of operation.")
>
> 3. The shipowner was not negligent in failing to supply proper equipment to the stevedore or in failing to eliminate an improper shipside method of operation by the stevedore in connection with the discharge of the dunnage from the ship. (The interrogatory from which this finding results was captioned "Negligence—Shipside.")
>
> 4. The method of operation used by the stevedore in handling the dunnage on the pier after it left the

2. By this finding the jury rejected the shipowner's contention that the dunnage which injured the plaintiff had never been on the ship.

ship's tackle was improper, *i.e.*, negligent or unsafe, because the stevedore did not secure the dunnage or make it fast, and this improper method of operation was a proximate cause of the plaintiff's injury. (The interrogatory from which this finding emanates was captioned "Shoreside—Method of Operation.")

5. The shipowner was negligent in failing to eliminate the stevedore's improper method of handling the dunnage on the pier after it left the ship's tackle and this negligence was a proximate cause of the plaintiff's injury. (The interrogatory from which this finding stems was captioned "Negligence—Pierside.")

6. The driver of the chisel was not negligent, either in picking up too much dunnage on his forks or in his method of driving the chisel on the pier.

7. The plaintiff was not contributorily negligent.

8. The stevedore breached its warranty to the shipowner to perform its job in a reasonably safe, competent, and workmanlike manner, or it was negligent in the manner in which it performed its job.[3]

We did not submit to the jury the question of whether the dunnage was an appurtenance of the ship. The evidence was uncontradicted that the dunnage had been removed from the ship to facilitate cargo operations and that it was destined to return to the ship at the end of the day. Accordingly, we informed counsel that it was our ruling that the dunnage was and remained an appurtenance of the ship while it was on the pier. Nor was there any dispute about the fact that the dunnage was fit for its intended purpose until the time it left the ship's tackle when it landed

3. This finding would have required that the shipowner be granted indemnity had the verdict been molded for the plaintiff.

on the pier. Until that time the dunnage was securely banded by the lumber bridles—indeed, plaintiff's witness Rutter testified that the dunnage was "tight and beautiful" when it left the ship. And the jury found that there was no improper handling of the dunnage until after it was released from the ship's tackle on the pier.

As the special findings of the jury indicate, we could have molded the verdict in favor of the plaintiff on only two theories; first, that the improper pierside method of operation by the stevedore in handling the dunnage on the pier rendered the ship unseaworthy; and second, that the shipowner's negligent failure to eliminate the stevedore's improper pierside method of operation breached a duty of care owed by the shipowner to the plaintiff.[4] For the reasons expressed in this Opinion, the law does not sustain either of plaintiff's theories, and we will deny the plaintiff's motion to remold the verdict in his favor.

II. *Did the Stevedore's Improper Pierside Method of Operation Render the Ship Unseaworthy?*

Plaintiff's first claim against the shipowner is that this accident is governed by federal maritime law, which includes the shipowner's warranty of seaworthiness. That doctrine is in essence "that things about a ship, whether the hull, the decks, the machinery, the tools furnished, the stowage, or the cargo containers, must be reasonably fit for

4. The jury's finding that there was no unseaworthy condition or any negligence respecting the shipside method of operation eliminated any possibility of molding a verdict for plaintiff on these aspects of the case. Thus, plaintiff's post trial argument that the failure of the shipowner to supply, and the stevedore to use, rope slings before the dunnage was lifted out of the hold rendered the ship unseaworthy is disposed of by the jury's findings of no negligence or unseaworthiness in the shipside methods of operation. We note too that this was purely a "method of operation" case; there was no contention by plaintiff of any unseaworthiness or negligence other than by an improper method of operation.

the purpose for which they are to be used." Gutierrez v. Waterman Steamship Corp., 373 U. S. 206, 213, 83 S. Ct. 1185, 1190, 10 L. Ed. 2d 297 (1963). This warranty of seaworthiness runs to longshoremen engaged in cargo operations, as well as to seamen. Seas Shipping Co. v. Sieracki, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946). By virtue of the Admiralty Extension Act of 1948, *supra,* maritime law governs not only accidents occurring on navigable waters, but also injuries "caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

However, maritime law, including the warranty of seaworthiness, does not apply to all accidents occurring during cargo operations. In Victory Carriers, Inc. v. Law, 404 U. S. 202, 92 S. Ct. 418, 30 L. Ed. 2d 383 (1971), the Supreme Court held that maritime law did not apply to an accident on the pier in which a longshoreman driving a cargo-laden forklift, owned by the stevedore, was injured by a defective protection rack on the forklift which came loose and fell on him. On the other hand, the *Victory Carriers* decision reaffirmed the Court's holding in Gutierrez v. Waterman Steamship Corp., 373 U. S. 206, 83 S. Ct. 1185, 10 L. Ed. 2d 297 (1963), that maritime law does apply when a longshoreman is injured on the pier by defective cargo containers, which are appurtenances of the ship, that were defective before they left the ship. The issue before us is whether this case is controlled by *Victory Carriers* or by *Gutierrez.* We have concluded that *Victory Carriers* controls.[5]

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5. The notion of the "applicability of maritime law" has three distinct aspects. In our reading of the caselaw we find various cases addressing different aspects of the notion without articulation. Accordingly, in the interest of clarity and precision of analysis, it will be helpful to discuss these three aspects and note which are before us here.

The first aspect is the issue whether the federal court has subject-matter jurisdiction, by virtue of the maritime nature of the case, under

As we have noted above, we are satisfied that the dunnage was an appurtenance of the ship, and remained so even after it was unloaded from the hold and stacked on the pier. In this respect the case before us is more akin to *Gutierrez* than to *Victory Carriers*. However, in *Gutierrez* the leaking cargo containers were defective and were leaking even before they were removed from the ship, and we regard this fact as crucial to the decision in that case. The dunnage here was not defective until after it left the ship's tackle, and then only because it was unbanded on the pier. It is not in the nature of dunnage to be banded while it is on the ship.[6] The plaintiff here has not cited to us, and

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5. (Cont'd.)
28 U. S. C. § 1333. This is not an issue in the case at bar because our jurisdiction stems from 28 U. S. C. § 1332, diversity of citizenship. The second aspect is a choice-of-law question: whether the substantive principles applicable to the case are principles of state law or principles of maritime law, including both the warranty of seaworthiness and maritime negligence law. It is to these two matters that the Extension of Admiralty Jurisdiction Act, 46 U. S. C. § 740, is relevant. The third aspect is the application of maritime law to the facts, *i.e.*, deciding whether under the facts the vessel was unseaworthy and whether the shipowner was negligent.

We have examined some of the cases discussed in this Opinion with reference to the classifications spelled out above. *Victory Carriers* dealt with the second question, the choice-of-law question. The last paragraph of Mr. Justice White's majority opinion indicated that a decision in that case that maritime law applied to the accident would not necessarily mean that the federal courts would have subject matter jurisdiction under § 1333, and suggests that it would be up to Congress to expand the admiralty subject-matter jurisdiction of the federal courts. *Gutierrez*, in the section of the opinion not dealing with negligence, deals with the third issue, in two parts: first, whether the defective cargo containers (bean bags) made the ship unseaworthy, and second, whether the unseaworthiness principle allows recovery to a longshoreman working on the pier rather than on the vessel. The Court answered both questions affirmatively. It is the second aspect of the notion of maritime jurisdiction—the choice-of-law question dealt with in *Victory Carriers*—with which we are concerned in this section of the Opinion.

6. However, as noted above, the jury in its findings rejected both the plaintiff's attempt to bring the case within *Gutierrez* and the plaintiff's argument that the failure to band the dunnage while

we have been unable to find, a single case applying the law of the sea to a longshoreman injured while working on the pier by an appurtenance of the vessel which was removed from the vessel and which was wholly fit when removed but rendered unfit by the stevedore after it was placed on the pier and detached from the ship's tackle.

The most notable cases in the area, including those relied upon by the plaintiff, are all inapposite. In Hagans v. Ellerman & Bucknall Steamship Co., 318 F. 2d 563 (3d Cir. 1963), the plaintiff was working in the pier shed unloading bags of sand from trucks onto which they had been placed by the ship's tackle, when he slipped on sand that had leaked onto the floor. Just as in *Gutierrez*, the evidence was that the sandbags were already leaking before they were removed from the ship's hold. In Thompson v. Calmar Steamship Corp., 331 F. 2d 657 (3d Cir. 1964), cert. denied, 379 U. S. 913, 85 S. Ct. 259, 13 L. Ed. 2d 184 (1964), the plaintiff was standing at the brake of a freight car containing cargo about to be loaded aboard the vessel. The ship's tackle was used to pull three other loaded cars into motion so that they would strike the plaintiff's car and thereby move it into proper position for loading. *Thompson* is thus distinguishable from the case at bar because the ship's tackle caused the injury while it was being improperly used. In Spann v. Lauritzen, 344 F. 2d 204 (3d Cir. 1965), cert. denied, 382 U. S. 938, 86 S. Ct. 386, 15 L. Ed. 2d 348 (1965), the plaintiff was injured by a defective piece of equipment owned by the stevedore and located on the pier but which was being used to unload the cargo from the ship. Our case is different because the dunnage was not being used as equipment in the direct unloading of the cargo.

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6. (Cont'd.)
still on the ship was improper. This case might have had a different result had the plaintiff been injured, *e.g.*, by sharp nails protruding from the dunnage.

Furthermore, we must be extremely careful in relying on pre-*Victory Carriers* precedents applying maritime law. *Victory Carriers* did not list which lower court decisions it approved and which it disapproved, but in 404 U. S. at 214, 92 S. Ct. 418, 30 L. Ed. 2d 383 n. 14, the Court noted the presence of "substantial confusion in the lower courts" and observed that "the cases are impossible to rationalize." Spann v. Lauritzen, *supra,* is one of the cases cited as an example. *Spann* is also cited with approval in the dissenting opinion, in which it is characterized as involving analogous facts to that in *Victory Carriers.* Accordingly, we think we are better advised to scrutinize *Victory Carriers* itself carefully for any teachings applicable to our case.

The Supreme Court's opinion approves the approach of "[r]eliance upon the gang plank line as the presumptive boundary of admiralty jurisdiction except for cases in which a ship's appurtenance causes damage ashore," 404 U. S. at 214 n. 14, 92 S. Ct. at 426. The Court examined the facts before it and found the absence of "the typical elements of a maritime cause of action": Was the plaintiff injured by "equipment that was part of the ship's usual gear or that was stored on board"; was the equipment that injured him attached to the ship; was the equipment under the control of the ship or its crew; and on which side of the gangplank did the accident occur? All of these typical elements were lacking in *Victory Carriers;* here we find only the first is present, and that only in attenuated fashion, since the dunnage was serving no function while it was being stored on the pier. The other elements are conspicuously absent.[7]

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7. Even though the location of the accident is one criterion for considering whether maritime law applies to the plaintiff's injury, it is not the sole criterion. In Executive Jet Aviation, Inc. v. City of Cleveland, 409 U. S. 249, 93 S. Ct. 493, 34 L. Ed. 2d 454 (1972),

Furthermore, the Court specifically held that the fact that the plaintiff in *Victory Carriers* was engaged in a very general sense in the process of unloading the cargo, historically a seaman's task (and noted as such on this record by Captain Ash), did not automatically entitle him to the benefit of the unseaworthiness remedy. Instead, said the Court, where the injury takes place on the pier, such as in *Gutierrez*, the plaintiff can recover only if his injury is caused by an appurtenance of the ship in such a way that the injury can be held to be an "injury, to the person . . . caused by a vessel on navigable water" within the language of the Extension Act. We cannot hold here, as plaintiff asks us to, that plaintiff's injury was "caused by a vessel on navigable water," since the dunnage was not on board or attached to the ship at the time; it was in seaworthy condition when it left the ship (the jury expressly so found) and until the time came for it to be moved from one place to another on the pier where the accident took place; and the ship's crew was in no way responsible for its handling after it left the ship's tackle. Thus for the reasons stated we conclude that *Victory Carriers* does not authorize recovery by the plaintiff in this case for unseaworthiness.

To afford the plaintiff here an unseaworthiness remedy, we would have to expand admiralty jurisdiction beyond the furthest point to which the Supreme Court has extended it, which is the *Gutierrez* case. For, as we have seen, the case before us lacks two elements present in *Gutierrez* which contributed to the link in that case with the maritime jurisdiction: the fact that the cargo containers were defective while still on board the ship, and the related fact that the shipowner had an opportunity to

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7. (Cont'd.)
the Court eschewed the strict situs-of-the-tort approach in favor of a more flexible analysis of the relationship of the accident to traditional maritime activity. This attitude is consistent with the philosophy of *Victory Carriers*.

repair the cargo containers while they were still under his control. Plaintiff in essence asks us to hold that the maritime jurisdiction applies even without these two elements. This we are unwilling to do. Just last term, the Supreme Court, in Executive Jet Aviation, Inc. v. City of Cleveland, 409 U. S. 249, 93 S. Ct. 493, 34 L. Ed. 2d 454 (1972), reiterating its approach in *Victory Carriers*, warned that "in determining whether to expand admiralty jurisdiction, 'we should proceed with caution . . . .'" We might add our own view that a district judge asked to expand the scope of maritime jurisdiction might exercise more caution than the Supreme Court, one of whose functions is to shape the law.

In *Victory Carriers* the Court noted that its decision in no way contravened the policy of compensating longshoremen for injuries without proof of fault because of the hazards of their occupation. This was so because injured longshoremen were generally covered by state workmen's compensation laws. Even if the plaintiff recovered from the vessel owner, the latter would more often than not be entitled to indemnity under its contract with the stevedore, so that the burden of the loss in any event would fall on the stevedore. When the longshoreman sues the shipowner for unseaworthiness, as the Court observed, what is generally at issue is not whether the longshoreman will recover, and from whom, but just how much he will recover from his employer. The legislatures, the Court said, may wish to make better provision for compensation of injured longshoremen when they have no remedy against the shipowner, but the Court is limited by the Extension Act from expanding the scope of seaworthiness protection afforded longshoremen working on the pier.

In fact, Congress did turn its attention to the arguable inequity of the availability of a tort remedy to some injured longshoremen but not others. However, the legislative

solution was not to further broaden the scope of the maritime jurisdiction; rather, Congress extended the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. §§ 901-950, to cover pierside as well as shipside accidents, § 903, and made this statutory compensation the *exclusive* compensation available to longshoremen "if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel." § 905(b) *See* Act of Oct. 27, 1972, P. L. 92-576, 33 U. S. C. § 905(b). And see generally Lucas v. Brinknes Schiffahrts GES. Franz Lange G. m. b. h. & Co., K. G., 379 F. Supp. 759 (E. D. Pa., filed Aug. 5, 1974) (Huyett, J.). The 1972 amendments eliminate a longshoreman's cause of action against a vessel for unseaworthiness, although it permits him to sue for the negligence of the vessel. Thus, even in the case of accidents clearly within the maritime jurisdiction, longshoremen will not be able to sue the vessel for injuries resulting solely from the negligence of their fellow employees.[8] Consequently, had this plaintiff's accident occurred after November 26, 1972, the effective date of the amendments, he would be denied recovery on the jury's finding of no shipside negligence by the shipowner,[8a] regardless of whether the stevedore's actions made the ship unseaworthy under traditional maritime law. Moreover, the legislative history of the 1972 amendments as explicated at length in *Lucas, supra,* consistent with the thrust of *Victory Carriers,* reflects the congressional intention to place the primary duty to provide a safe place for a longshoreman to work upon the stevedore. Hence, our discus-

8. Under the Act prior to amendment, the common case before the judges of this Court was one in which the longshoreman's claim was based upon unseaworthiness and the ship had been rendered unseaworthy by actions of the stevedore's employees. Such a case no longer gives rise to liability of the vessel.

8a. We discuss the effect of the jury's finding of pierside negligence by the shipowner, *infra.*

sion in this opinion of this intellectually fascinating borderline situation, while of course having the utmost importance to Mr. Mascuilli, will have virtually no precedential effect.

Our research has uncovered only one case on all fours with this case, and it supports the result we reach. In Snydor v. Villain & Fassio et Compania Internazionale Di Genova Societa Reunite Di Naviagaione, S. P. A., 459 F. 2d 365 (4th Cir. 1972), plaintiff Green was working in the pier shed spotting pallets of cargo unloaded from the ship. He was injured when a case of cargo fell from a stack of pallets, and he claimed that his injury was caused by defective cargo pallets, which were an appurtenance of the ship. However, at the trial he offered no evidence that the pallets were defective when they left the ship. Instead, the evidence tended to prove that the defect in the pallets resulted from the negligence of a forklift operator during the stacking of the pallets after they left the ship. The Court of Appeals affirmed denial of maritime recovery, holding that evidence that the pallets were defective when they left the ship would be "a fact crucial to establishing a maritime cause of action under the Admiralty Extension Act." 459 F. 2d at 368. The Court thus distinguished *Gutierrez*, as we have done, on the ground that in *Gutierrez* the cargo containers were defective when they left the ship; where they did not become defective until later, and no personnel from the vessel made them defective, recovery must be denied.

This case is strikingly similar to *Snydor*. The dunnage was in proper condition when it left the ship, being adequately contained by the lumber bridles; there was no need for it to be banded while it sat in one place on the pier; only when the stevedore lifted the dunnage on the forks of the chisel to move it on the pier was there anything wrong with the condition of the dunnage, *i.e.*, it was unbanded and loose. We thus agree with the Fourth Circuit, the only court we have found that has ruled on this

precise point. We also infer from a reading of *Gutierrez* the strongest implication that if the bean bags had not begun leaking until after they were landed on the pier, and it was the negligence of the longshoremen that caused them to leak, *e.g.*, handling the bags with sharp hooks to move them from the pier into the pier shed, then the case would have been decided the other way.

Garrett v. Gutzeit O/Y, 491 F. 2d 228 (4th Cir. 1974), relied upon by plaintiffs, is inapposite. In *Garrett*, which is a case virtually on all fours with *Gutierrez*, a longshoreman was injured when some wire bands used to compress bales of pulp paper which had been discharged from the vessel broke under the stress of a hand hook while the dock gang was jumping a bale up to the fourth tier of a stack. The accident occurred 3½ hours after the work started during which time numerous bands on the cargo had been breaking. The evidence was that the bands broke because of the way the bales had been wedged in the hold of the ship; that shifting weight during the voyage and the strain of the wedged bales had caused breakage; and that the ship's crew was on duty during the unloading and had observed the defective condition of many of the bands for over three hours. Thus, unlike the present case, the appurtenance causing the accident was defective prior to leaving the ship. In a footnote, the *Garrett* court cites *Gutierrez* as "establish[ing] that jurisdiction existed on the dock *if the shipowner discharged defective cargo containers.*" *Id.* at 233 n. 8 (emphasis added). And the court reaffirmed the holding of *Snydor, supra,* that "[a] fact crucial to establishing a maritime cause of action under the Admiralty Extension Act is that the cargo containers were defective when they left the ship." *Id.* n. 9.

In sum, the jury's finding of an improper pierside method of operation by the stevedore does not aid plaintiff's case. Under the facts of this case and the applicable

law, plaintiff has no maritime cause of action under the Admiralty Extension Act; hence the verdict was properly molded for the shipowner on the issue of unseaworthiness.[9]

We also believe, however, that even if the warranty of seaworthiness applies in this case, that the improper pierside method of operation by the stevedore did not render the ship unseaworthy. We have little doubt that improper method of operation by the stevedore's employees on board the ship or on the pier while using the ship's tackle renders the ship unseaworthy, *see, e.g.*, Ferrante v. Swedish American Lines, 331 F. 2d 571 (3d Cir. 1964), petition for cert. dismissed, 379 U. S. 801, 85 S. Ct. 10, 13 L. Ed. 2d 20 (1964); Scott v. Isbrandtsen Co., 327 F. 2d 113 (4th Cir. 1964), as long as the improper method of operation is not merely instantaneous, Usner v. Luckenbach Overseas Corp., 400 U. S. 494, 91 S. Ct. 514, 27 L. Ed. 2d 562 (1971). However, we have found no authority suggesting that an improper pierside method of operation by the stevedore when the ship's tackle is not being used and the cargo is not being moved onto or off of the ship renders the ship unseaworthy, even though the stevedore is generally engaged in the process of loading or unloading. Therefore, we would address the third aspect of maritime jurisdiction referred to in note 5, *supra*, with the conclusion that the improper pierside method of operation specially found by the jury did not render the vessel unseaworthy as a matter of law, and accordingly, unseaworthiness recovery by the plaintiff must be denied on this additional ground.

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9. Plaintiff has not argued that there is an unseaworthiness doctrine in Pennsylvania law which would be applied even though federal maritime law is not. Nor are we aware of any such doctrine. *See* Cooper v. Australian Coastal Shipping Comm'n, 338 F. Supp. 1056 (E. D. Pa. 1972), aff'd mem., 474 F. 2d 1340 (3d Cir. 1973); McNeil v. A/S Havbor, 339 F. Supp. 1264 (E. D. Pa. 1972).

III. *Did the Shipowner's Negligence as Found by the Jury Breach a Duty to the Plaintiff?*

Plaintiff's second claim for the molding of the verdict in his favor stems from the jury's findings that the shipowner was negligent in failing to eliminate the stevedore's improper method of handling the dunnage on the pier after it left the ship's tackle and that this negligence was a proximate cause of the plaintiff's injury. These findings frame the plaintiff's contention that, even if he cannot recover on the basis of the vessel's unseaworthiness, he is entitled, by reason of the jury's finding, to recover on the basis of negligence. Negligence, he reminds us, is a separate and distinct doctrine from that of unseaworthiness. *See* Earles v. Union Barge Line, 486 F. 2d 1097 (3d Cir. 1973).

The maritime law includes a negligence principle embodying the standard of reasonable care, *see* Kermarec v. Compagnie Generale Transatlantique, 358 U. S. 629, 630, 79 S. Ct. 406, 3 L. Ed. 2d 550 (1959).[10] Moreover, *Victory Carriers* dealt only with the doctrine of unseaworthiness, negligence was not at issue. However, we do not see that as a distinction with a meaningful difference. In view of the reasoning of *Victory Carriers,* we believe that the Court would have held that there was no federal maritime jurisdiction in the choice of law sense (see n. 5 supra) over a negligence claim by plaintiff.

The foregoing conclusion does not of course end our inquiry, for the case is here under the diversity jurisdiction where plaintiff might be entitled to recover on the ground of state negligence law (although he asserted no such claim at trial). The maritime law of negligence may well be broader than that embodied in the law of Pennsylvania which would be applicable if state law applies. However, under either Pennsylvania law or maritime law, the

10. Plaintiff is not a merchant seaman, hence the Jones Act, 46 U. S. C. § 688 (1970), does not apply.

defendant is not liable to the plaintiff if the accident did not result from defendant's breach of a duty of care owed to the plaintiff. And under the facts of this case, there is no evidence of a duty of care owed by the shipowner to the plaintiff or of a breach thereof if any such duty existed. Further, the jury's finding that the shipowner was negligent in failing to eliminate the stevedore's improper method of handling the dunnage on the pier after it left the ship's tackle is devoid of even minimal evidentiary support which would enable us to mold a verdict for the plaintiff.[11]

The principal question in this area is whether the shipowner had a duty to the plaintiff to see that the dunnage was not transported from one spot on the pier to another without having first been banded. As we understand Pennsylvania law (and also maritime law), the defendant shipowner had no duty to use reasonable care to see that the method of operation employed on the pier after the cargo left the ship's tackle was safe and proper. To say that cargo operations are traditional duties of seamen, that is, shipowner's employees, *see* Seas Shipping Co. v. Sieracki, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946), is not necessarily to conclude that even when the cargo operations are delegated to an independent contractor (the stevedore), as they were here, the shipowner retains supervision and control of the entire operation. It is true that the shipowner remains in control of the ship and cannot delegate his duty to provide longshoremen with a reasonably safe

11. Our view on this point has not changed since the time of the trial. We submitted the issue of pierside negligence to the jury only to avoid the necessity of a retrial in the event that we did change our view upon the further reflection that we knew we could afford on post trial motions. A similar course was followed by our colleague Judge Higginbotham in The Venzie Corporation v. United States Mineral Products Company, Inc., 382 F. Supp. 939 (E. D. Pa., filed July 7, 1974).

place to work while they are on the ship, *see* Beard v. Ellerman Lines, Ltd., 289 F. 2d 201 (3d Cir. 1961). But it is equally true that the shipowner has no control of the pier and correspondingly no duty, for instance, to repair or warn against the presence of holes in the pier floor. *Cf.* McNeil v. A/S Havbor, 339 F. Supp. 1264 (E. D. Pa. 1972). And while there was a broad opinion by Captain Ash as to the generalized role of the master of the vessel in connection with cargo operations, there was no evidence here of control or right of control in the ship or even evidence from which an inference of control could be drawn such as would justify a verdict under state law. *Cf.* Spinozzi v. E. J. Lavino & Co., 243 F. 2d 80 (3d Cir. 1957).

On this record it appears that the longshoremen were employees of the stevedore only and they took their orders from the stevedore only, not from the ship's officers. The shipowner's supervision over the method of cargo operations extended beyond the gangplank onto the pier only to the extent that appurtenances of the ship, such as winches and booms and cables, were used to move cargo between the pier and the ship. Operations strictly on the pier, involving use of the stevedore's equipment only, were not subject to control by the shipowner. The courts have recognized that a duty of care does not always arise whenever ship's officers are present to observe and inspect operations by a contractor. *See* West v. United States, 361 U. S. 118, 80 S. Ct. 189, 4 L. Ed. 2d 161 (1959); Bryant v. National Transport Corp., 467 F. 2d 139 (3d Cir. 1972) ("the evidence would not support a finding that the shipowner had retained possession or control of the area or the activity in which the accident occurred"); McGrath v. N. V. Reederin "Nautiek", Civ. No. 70-3361 (E. D. Pa. Dec. 30, 1971) (shipowner had no control over unloading of cargo from boxcar on pier); Cooper v. Australian Coastal Shipping Comm'n, 338 F. Supp. 1056 (E. D. Pa. 1972), aff'd mem., 474 F. 2d

1340 (3d Cir. 1973) (shipowner had no control over cargo movements on the pier). This is so even though the dunnage being moved on the pier by the stevedore was the property of the shipowner; the shipowner had no more duty to supervise the method of moving its property along the pier than it would, under the cases just cited, to supervise the method of moving cargo, which is entrusted to it as a carrier along the pier.

Since we hold that on this record and as a matter of law the shipowner had no duty to control the manner in which the stevedore operated on the pier after the ship's tackle was no longer involved, we cannot mold the jury's special finding of negligence into a verdict for the plaintiff. This holding is buttressed by analogy to the keystone of the plaintiff's case—*Gutierrez.* In *Gutierrez,* the Supreme Court held that the shipowner was negligent in permitting the discharge of defective bean bags, even though the impact of that negligence, *i.e.,* the accident which occurred on the pier, was felt only in a place the shipowner did not control. That teaching is inapposite here because of the same factual distinction that has persuaded us that *Gutierrez* does not control disposition of our unseaworthiness issue. The bean bags were defective and leaking while they were on the ship in *Gutierrez;* the shipowner had control of them at that time and should have known of their condition and repaired them then. In our case, however, the jury found that the dunnage was removed from the ship in a proper manner, and that only the pierside method of operation by the stevedore was improper. As we have noted, the evidence did not show that the shipowner had the power to direct the manner in which the longshoremen working on the pier and not using the ship's tackle performed their duties. Thus, while the nondelegable duty of care referred to in *Gutierrez* was a duty "not to create this risk" to the plaintiff, the evidence before us is clear that the shipowner

did not "create the risk" to the plaintiff here. The risk was created only by the stevedore's employees, and the question we are deciding is whether the shipowner had a duty to prevent them from creating that risk; we hold that it did not.

The conclusion which we reach is further buttressed by a consideration of the legislative history of the 1972 amendments, for as noted in the *Lucas* opinion, *supra,* it was the clear intention of Congress to place the primary duty to provide a safe place for a longshoreman to work upon the stevedore. And, just as was the case of our analysis of the plaintiff's unseaworthiness claim, we feel constrained to observe that the 1972 amendments virtually emasculate the precedential effect of this decision. Finally, we note that the plaintiff has cited to us no cases holding a shipowner liable for negligent failure to eliminate an improper pier-side method of operation by the stevedore not involving use of the ship's tackle. We have been unable to find any such cases ourselves. In sum, we hold that in the circumstances of this case, the defendant shipowner has breached no duty to exercise care to eliminate the improper method of operation employed by the third-party defendant stevedore in moving the dunnage along the pier without first securing it.[12]

IV. *Conclusion*

For the reasons stated, we will deny the plaintiff's motion to remold the verdict in his favor, or in the alternative, to grant a new trial.

12. We have already noted that the plaintiff's theory of the shipowner's negligence in failing to supply or requrie the use of rope slings before the dunnage left the hold was rejected by the jury in their answers to the special interrogatories.

APPENDIX

SPECIAL INTERROGATORIES TO THE JURY *

I. *Ownership of the Dunnage*

Was the dunnage which fell from the chisel striking the plaintiff the property of the shipowner which had been removed from the ship earlier that day and placed on the pier by the employees of the stevedore?

Yes

Yes ____ No ____

II. *Unseaworthiness*

A. *Shipside*

1. *Method of Operation*

Was the method of operation used by the stevedore in discharging dunnage from the vessel between 8:00 a.m. and 9:00 a.m. on July 8, 1970 improper (i.e., negligent or unsafe)? (in answering this interrogatory you are to consider the method of operation used up until the time the dunnage was released from the ship's tackle onto the pier).

No

Yes ____ No ____

2. *Proximate Cause*

If the answer to the foregoing interrogatory is yes, was the improper method of operation a proximate cause of the injury to plaintiff?

No

Yes ____ No ____

* *Note to Jurors:* If the answer to an interrogatory is, by a fair preponderance of the evidence, "yes", then you should check the box marked "yes"; otherwise you should check the box marked "no". Your verdict as to each interrogatory must be unanimous.

B. *Shoreside*

1. *Method of Operation*

(a) Was the method of operation used by the stevedore in handling the dunnage on the pier after it left the ship's tackle on July 8, 1970 improper (i.e., negligent or unsafe) because the stevedore did not secure the dunnage or make it fast?

Yes

Yes ____ No ____

(b) If the answer to the foregoing interrogatory is "yes," was the improper method of operation a proximate cause of the injury to plaintiff?

Yes

Yes ____ No ____

2. *The Chisel*

(a) Did Mr. Grogans pick up too much dunnage on his forks?

No

Yes ____ No ____

(b) If the answer to the foregoing interrogatory is "yes," was that fact a proximate cause of the injury to plaintiff?

No

Yes ____ No ____

(c) Did Mr. Grogans drive the chisel negligently?

No

Yes ____ No ____

(d) If the answer to the foregoing interrogatory is "yes," was Mr. Grogans' negligent driving of the chisel a proximate cause of the injury to plaintiff?

No

Yes ____ No ____

III. *Negligence*

A. *Shipside*

1. Was the shipowner negligent in failing to supply proper equipment to the stevedore or in failing to eliminate an improper shipside method of operation by the stevedore in connection with the discharge of dunnage from the vessel between 8:00 a.m. and 9:00 a.m. on July 8, 1970? (In answering this interrogatory, you are to consider the method of operation used up until the time the dunnage was released from the ship's tackle onto the pier)

	No
Yes	No

2. *Proximate Cause*

If the answer to the foregoing interrogatory is "yes," was the negligence of the shipowner a proximate cause of the injury to plaintiff?

	No
Yes	No

B. *Pierside*

1. Was the shipowner negligent in failing to eliminate an improper pierside method of operation by the stevedore in connection with the handling of dunnage on the pier after it left the ship's tackle?

Yes	
Yes	No

2. *Proximate Cause*

If the answer to the foregoing interrogatory is "yes," was the negligence of the shipowner a proximate cause of the injury to plaintiff?

Yes	
Yes	No

IV. *Contributory Negligence*

A. *Acts or Omissions*

Was the plaintiff guilty of any negligence which contributed to his accident?

	No
Yes	No

B. *Proximate Cause*

If the answer to the foregoing interrogatory is "yes," was plaintiff's contributory negligence a proximate cause of his injuries?

	No
Yes	No

C. *Percentage*

If the answer to the foregoing interrogatory is "yes," to what extent, expressed in percentage, did plaintiff's negligence contribute to his injuries?

0%

V. *Third Party Action*

A. *Breach of Warranty or Negligence*

Did the stevedore breach its warranty to perform its job in a reasonably safe, competent and workmanlike manner, or was it negligent in the manner in which it performed its job?

Yes	
Yes	No

B. *Proximate Cause*

If the answer to the foregoing interrogatory is "yes," was the negligence of the shipowner a proximate cause of the injury to plaintiff?

Yes	
Yes	No

APPENDIX B.

JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By THE COURT,

ALDISERT,
Circuit Judge.

Attest:
THOMAS F. QUINN,
Thomas F. Quinn, *Clerk.*

DATED: March 24, 1975.

Certified as a true copy and issued in lieu of a formal mandate on April 15, 1975.

Test:
THOMAS F. QUINN,
Clerk, United States Court of Appeals
for the Third Circuit.

APPENDIX C.

UNITED STATES CONSTITUTION.

Article III—The Judiciary.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

APPENDIX D.

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: *Provided further*, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed

a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico, June 25, 1948, c. 646, 62 Stat. 930; July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub. L. 85-554, § 2, 72 Stat. 415; Aug. 14, 1964, Pub. L. 88-439, § 1, 78 Stat. 445.

APPENDIX E.

Chapter 19A.—Admiralty and Maritime Jurisdiction.

§ 740. Extension of admiralty and maritime jurisdiction; libel in rem or in personam; exclusive remedy; waiting period

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: *Provided,* That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: *Provided further,* That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage. June 19, 1948, c. 526, 62 Stat. 496.

COUNTERSTATEMENT OF QUESTIONS PRESENTED.

Where the Court of Appeals has affirmed per curiam the decision of the lower court in favor of Respondents, and where there is no significant legal issue involved and no conflict between the circuits on the law applied by the trial judge, and the decision has virtually no precedential effect because of the enactment of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, should not the petition for writ of certiorari be denied.

COUNTERSTATEMENT OF THE CASE.

Petitioner, Charles Mascuilli, a longshoreman, brought this action to recover damages for personal injuries allegedly sustained on July 8, 1970 while he was working at Pier 40, South wharves, Philadelphia. Respondent American Export Isbrandtsen Lines, Inc., is a shipowner, whose vessel, the SS EXECUTOR, was docked at Pier 40, loading and discharging cargo. Respondent joined Mascuilli's employer, Atlantic & Gulf Stevedores, Inc., a stevedoring company engaged to handle the cargo, as third-party defendant.

At approximately 2:00 P. M., Mascuilli was standing on the pier and was struck by dunnage which fell from a forklift truck being driven by a co-worker (App. 21a). The jury found in answer to a special Interrogatory that the dunnage was the property of the shipowner, and had been removed from respondent's vessel earlier that day and placed on the pier by employees of the stevedore.

Petitioner's evidence established that the dunnage was removed from the vessel between 8:00 and 9:00 A. M. that morning bound by lumber bridles, which are two straps each having a choker device which pulls the straps tight as the load is lifted (App. 19a), and that the load was "tight and beautiful" when the dunnage left the ship (App. 56a; Notes of Testimony 102). In addition, petitioner's expert, Captain William Ash, testified that no additional slinging or banding of the dunnage was required before the dunnage was taken off the vessel (Notes of Testimony 458 and 462).

Petitioner sought to establish liability of the vessel owner on the basis of unseaworthiness and negligence. The action was presented to the jury on special Interrogatories, and the jury found, inter alia, that the dunnage belonged to the shipowner, that there was no improper

method of operation used in connection with the dunnage before it was released from the ship's tackle onto the pier, and that shipowner was not negligent with respect to any of the activities which took place before the dunnage was landed on the pier. The jury found that the stevedore's method of operation in handling the dunnage on the pier after it left the ship's tackle was improper, and that the shipowner was negligent in failing to eliminate the stevedore's shoreside improper method of handling the dunnage. The jury also found that the stevedore breached its warranty to the vessel owner to perform its work in a safe, proper and workmanlike manner (App. 45a to 48a).

There was no evidence that the vessel's crew were present on the pier at any time during the day, or that they knew of the stevedore's operation involving the dunnage.

On the basis of these findings the court molded a verdict in favor of the respondent. Petitioner submitted a motion to remold the verdict in his favor, which was denied on August 23, 1974, and he appealed from that Order. The Court of Appeals for the Third Circuit affirmed per curiam the Order of the District Court. This Petition for Writ of Certiorari then followed.

REASONS FOR DENYING THE WRIT.

Petitioner Has Adduced No Legal Grounds Justifying a Review of This Case by This Court.

Petitioner's argument fails to state any legal grounds supporting a review of this case on a writ of certiorari. Petitioner instead has chosen to discuss the merits of the case. He advances the same arguments that he raised in the Third Circuit, which rejected them by affirming the District Court's opinion. The sole purpose of the petition for a writ of certiorari is to seek to have this Court reconsider facts that have already been fully considered.

The trial court was correct in molding a verdict in favor of the shipowner in light of the jury's findings. There is no maritime jurisdiction over this shore-side accident because the instrumentality involved, though the vessel's appurtenance, came from the vessel in perfect condition, and was only thereafter rendered dangerous on account of the stevedore's operations ashore. There was no evidence that the vessel owner controlled these operations, and there is no basis for recovery against the vessel owner either under maritime or diversity jurisdiction. The petition for writ of certiorari should not be granted because there is no significant legal issue involved, no conflict between the circuits regarding existing law, and also because of the statutory changes in the law which was controlling when the case was decided.

This case is basically one decided on its facts. The molding of the verdict by the Trial Judge did not, as petitioner attempts to suggest, invade the jury's province as fact finders, but simply brought their findings into conformity with existing law.

The decision reached in this case does not conflict with *Victory Carriers, Inc. v. Law*, 404 U. S. 202 (1971),

and *Gutierrez v. Waterman Steamship Corp.*, 373 U. S. 206 (1963). As the learned Trial Judge stated in his opinion, the petitioner did not cite and his own research failed to disclose any case supporting the petitioner's contention that *Gutierrez* was applicable, 381 F. Supp. at 774 (A 7-8). The decision, moreover, does not represent an inter-circuit conflict, for the only other case on all fours with this one, *Snydor v. Villain and Fassio et Compania Internazionale Di Genova Societa Reunite Di Naviagaione, S. P. A.*, 459 F. 2d 365 (4th Cir. 1972), supports the result reached by the trial court, 381 F. Supp. at 776-77 (A 13-14).

Finally, the Trial Judge stressed in his opinion that plaintiff could not have recovered on the instant facts under the terms of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 901-950, 381 F. Supp. at 776 (A 11-13). Litigation involving facts similar to those of this case and arising from accidents that occurred prior to the enactment of these Amendments is rapidly disappearing. The questions presented by petitioner are thus of diminishing importance. Judge Becker himself stated that his opinion carries "virtually no precedential effect." 381 F. Supp. at 776 (A 13).

CONCLUSION.

Two Courts, after careful consideration, have already rejected the arguments advanced by petitioner. Because this case presents no grounds justifying review by this Court, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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